Hearing Date: May 27, 2009 at 10:00 a.m.
Objection Deadline: May 19, 2009 at 4:00 p.m.

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ATTORNEYS FOR THE
INDIANA STATE TEACHERS RETIREMENT FUND,
INDIANA STATE POLICE PENSION TRUST, AND
INDIANA MAJOR MOVE CONSTRUCTION

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

	)	
In re	)	Chapter 11
	)	
CHRYSLER, LLC, et al.,	)	Case No. 09-50002 (AJG)
	)	Jointly Administered
Debtors.	)	
	)	

OBJECTION OF INDIANA PENSIONERS TO DEBTORS' MOTION (A) AUTHORIZING THE SALE OF SUBSTANTIALLY ALL OF THE DEBTORS' OPERATING ASSETS, FREE AND CLEAR OF LIENS, CLAIMS, INTERESTS AND ENCUMBRANCES, (B) AUTHORIZING THE ASSUMPTION AND ASSIGNMENT OF CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES IN CONNECTION THEREWITH AND RELATED PROCEDURES AND (C) GRANTING CERTAIN RELATED RELIEF

TO THE HONORABLE ARTHUR J. GONZALEZ,
UNITED STATES BANKRUPTCY JUDGE:

The Indiana State Teachers Retirement Fund, Indiana State Police Pension Trust, and Indiana Major Move Construction, pension funds, which are fiduciaries for the investment of retirement assets for approximately 100,000 civil servants, including firemen, policeman, school teachers and their families (collectively, the "Indiana Pensioners"), by and through their undersigned counsel, hereby files this objection (the "Objection") to the Motion of Chrysler, LLC ("Chrysler") and the above-captioned debtors and debtors in possession (collectively, the "Debtors"), Pursuant to Sections 105, 363 and 365 of the Bankruptcy Code and Bankruptcy Rules 2002, 6004 and 6006, to sell of Substantially All of the Debtors' Operating Assets, Free and Clear of Liens, Claims, Interests and Encumbrances, (B) Authorizing the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases in Connection Therewith and Related Procedures, and (C) Granting Certain Related Relief [Docket No. 190] (the "Sale Motion"). In support of their Objection, the Indiana Pensioners respectfully state and represents as follows:

PRELIMINARY STATEMENT

The Indiana Pensioners are holders of first lien debt, secured by substantially all of the Debtors' assets. In their Sales Motion, the Debtors seek authority to sell substantially all such collateral, and to distribute the proceeds of such collateral to, among others, unsecured creditors, primarily trade creditors and the UAW. Following such proposed sale and distribution, there will be nothing substantive left in this case. Indeed, the government has repeatedly stated its objective of reorganizing Chrysler within a 30-day time period. To do so, the government needed to avoid the requirements of Chapter 11. The government has done exactly that, by seeking approval of a *sub rosa* plan without following any of the required procedures for confirmation. The Debtors' position that its business is effectively a "melting ice cube" provides no grounds of approval of an illegal *sub rosa* plan. The courts can approve the sale of "melting" assets, but there is no authority for approving a distribution scheme in a Section 363 sale. Indeed, not a single court has ever approved a sale and distribution of proceeds as proposed here.

In addition to being an illegal *sub rosa* plan, the Debtors' Sale Motion seeks to extinguish the property rights of the secured lenders, trampling the most fundamental tenets of creditor rights in disregard of over 100 years of bankruptcy jurisprudence. The Debtors' proposed restructuring of stakeholders' rights seeks to make billions dollars of payments to unsecured creditors, while paying the secured creditors only 29 cents.

In addition, the financing the proposed by the section 363 sale is illegal. The United States Treasury Department is accessing funds under the Troubled Asset Relief Program ("TARP"). TARP, however, provides funds only for the purchase of trouble assets from financial institutions. Chrysler is an automotive company, not a financial institution. The Treasury Department is also improperly controlling Chrysler, without authority, before it even purports to purchase any assets. The Debtors' motion must be denied.

BACKGROUND[1]

1. On April 30, 2009 (the "Petition Date"), the Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code, thereby commencing their respective chapter 11 cases (collectively, the "Chapter 11 Cases"). The Debtors purport to be operating their businesses as debtors and debtors in possession pursuant to sections 1107 and 1108 of the Bankruptcy Code. The Chapter 11 Cases are being jointly administered for procedural purposes.

2. Chrysler and certain of its affiliates are parties to that certain Amended and Restated First Lien Credit Agreement, dated as of August 3, 2007 (as may have been amended or supplemented, the "Senior Credit Agreement") with JPMorgan Chase Bank N.A., as administrative agent (the "Administrative Agent"), and certain lenders party thereto from time to time (the "Senior Secured Lenders"), under which the Senior Secured Lenders are owed $6.9 billion (the "Senior Secured Debt") secured by a first lien on substantially all of the Debtors'

[1] Certain of the facts set forth herein are based upon the representations of the Debtors in the Sale Motion. The Indiana Pensioners Lenders reserve the right to challenge such representations, and nothing herein shall constitute a waiver of such right.

assets, including their plants, equipment, inventory, bank accounts, and almost every other U.S. asset owned by the Debtors (the "Collateral"). Senior Credit Agreement; Affidavit of Ronald E. Kolka ("Kolka Aff.") ¶ 28 [Docket No. 23].)

3. On May 3, 2009, the Debtors filed the Sale Motion. On May 5, 2009, the Court held a hearing to consider proposed bidding procedures. On May 7, 2009, the Court approved the bidding procedures and set the hearing to consider the Sale for Motion for May 27, 2009.

I. The Secured Lenders Loan Billions Of Dollars To Chrysler

4. The Indiana Pensioners are holders of first priority secured claims. Their claims arise out of nearly $10 billion of loans taken in 2007. (Senior Credit Agreement § 2.1; Kolka Aff. ¶ 26) These loans financed the purchase of the company, and were hailed at the time for returning Chrysler to U.S. control.

5. The Senior Secured Lenders made the loans because the Senior Secured Debt was secured by first priority liens on the Collateral. (Senior Credit Agreement § 3.14; Kolka Aff. ¶ 28) These liens, and the security they afforded, are crucial to the Indiana Pensioners because they are responsible for investing billions of dollars on behalf of millions of ordinary Americans and pension funds, such as the Indiana State Public Employees Retirement Fund, which is responsible for protecting the retirement of school teachers and police officers. This responsibility caused the Indiana Pensioners to seek the safety of secured loans. They paid for this security by accepting a comparatively low interest rate.

II. The Global Financial Crisis And TARP

6. In December of 2007, less than a month after the Senior Secured Lenders' loan to Chrysler, the United States economy entered into the worst recession since the Great Depression, which resulted in an unprecedented response from the United States government. Perhaps the most widely reported element of that response was the Emergency Economic Stimulus Act

("EESA"), which was passed by Congress and signed by President George W. Bush on October 3, 2008. 12 U.S.C. § 5202. One critical component of the EESA was the TARP, which gives the Secretary of the Treasury the power to purchase "troubled assets" from "financial institutions." 15 U.S.C. § 211. TARP authorized the government to inject hundreds of billions of dollars into the national banking system in order to restore confidence in the economy and reestablish the flow of credit.

7. Chrysler (along with the rest of the automotive industry) suffered tremendous losses in 2008, following drastic reductions in automobile sales. (See Chrysler Plan for Long-Term Viability, Feb. 17, 2009 at U32-37 (the "Feb. 17, 2009 Viability Report"); Kolka Aff. ¶¶ 55-58) By the end of 2008, it was very clear that Chrysler was running out of money, as it had only $1.898 billion of cash left. (Kolka Aff. Schedule 3)

III. Chrysler Seeks Government Assistance

8. By the fourth quarter of 2008, Chrysler's deteriorating cash position caused it to seek financial assistance from the United States government. (See Dec. 2, 2008 Viability Report; Kolka Aff. ¶ 59) Shortly before that request, then-Treasury Secretary Henry Paulson testified that TARP authorized investment in financial institutions, and "auto companies fall outside of that purpose." (See Oversight of Implementation of the Emergency Economic Stabilization Act of 2008 and of Government Lending and Insurance Facilities; Impact on Economy and Credit Availability: Hearing Before the H. Comm. on Fin. Servs., 110th Cong. 19 (Nov. 18, 2008) (statements of Henry M. Paulson, Jr.)) Subsequently, Chrysler was instructed to seek Congressional authorization if it wanted government assistance.

9. Chrysler then lobbied for such authorization and, although on December 10, 2008, the House of Representatives passed the Auto Industry Financing Restructuring Act (H.R. 7321, 110th Cong. § 10 (2008)), the Senate did not and the bill was not enacted into law.

10. Less than a week after having failed to obtain congressional authority to provide financing to Chrysler, the Treasury Department remarkably declared Chrysler, an automobile company, a "financial institution," so that the Treasury Department could access TARP Funds. That complete reversal of its prior admission is plainly without merit.

11. On December 31, 2008, Chrysler and the Treasury Department entered into a Loan and Security Agreement ("Treasury Loan and Security Agreement"), pursuant to which, the government loaned Chrysler $4 billion on a third-priority secured basis at approximately 5% interest. (Appendix A, Supplement to Treasury Loan and Security Agreement § 2.01; Treasury Loan and Security Agreement §§ 2.05, 4.01) Thus, the government took a security interest in Chrysler's assets which was junior in priority to the existing liens of the Indiana Pensioners. Although the maturity date of the loan was December 30, 2011, the government had the right to accelerate the entire amount due if Chrysler failed to submit a restructuring plan, or "viability plan," acceptable to the government by February 17, 2009 (after the inauguration of a new president). (Treasury Loan and Security Agreement § 7.20(a); <u>Kolka Aff.</u> ¶ 68)

12. This loan agreement left Chrysler at the mercy of the Treasury Department in a number of ways. <u>First</u>, the amount of the loan was not nearly enough to fund a meaningful restructuring. The $4 billion was simply an interim lifeline that would postpone Chrysler's collapse until after the new administration took office in January, 2009. <u>Second</u>, the Treasury Department would have complete discretion to determine whether Chrysler's viability plan was satisfactory. If the government chose to reject the plan, it would have the right to call the full amount of the loan. <u>Third</u>, even if Chrysler put forth a reasonable viability plan, the government made no commitment to provide the additional funds necessary to allow Chrysler to implement its plan.

IV. The Government Rejects Chrysler's Plan And Chrysler Cedes Control

13. Chrysler submitted its plan to the President's Task Force on the Auto Industry ("the Auto Task Force") on February 17, 2009. Kolka Aff. ¶ 68. The viability plan submitted by Chrysler called for a reorganization of Chrysler on a stand-alone basis. Feb. 17, 2009 Viability Report at 13. In the viability plan, Chrysler admitted that it could not survive absent relief from the Senior Lenders' debt, the debt owed under the Treasury Loan and Security Agreement, and the obligations owed to the United Auto Workers' Voluntary Employment Benefit Association ("VEBA"). Kolka Aff. ¶¶ 79, 80. In that regards, Chrysler stated its intention of obtaining $50 billion of aggregate relief from those three lender groups, and speculated that the debt would be exchanged for some combination of common stock, preferred stock, new debt, and cash. Feb. 17, 2009 Viability Report at 13. Chrysler also stated that during the course of this reorganization and following it, Chrysler would seek to finalize an alliance with Fiat S.p.A ("Fiat"). Feb. 17, 2009 Viability Report at 13, 81-97, Gluckman Decl., Ex. A.

14. On March 30, 2009, newly-elected President Barack Obama announced the rejection of Chrysler's viability plan. The President determined to override the determination by Chrysler's management that Chrysler was viable as a stand-alone going concern. (See Remarks by the President on the American Automotive Industry (March 30, 2009), http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-on-the-American-Automotive-Industry-3/30/09, (the "Remarks by the President")) The President informed the country that the government would give Chrysler thirty days to reach an agreement with Fiat, its unions, and its creditors (including the Senior Secured Lenders) under which Chrysler and Fiat would combine to form a new entity. (Id.) Also, the President required Chrysler to restructure itself in a way that enabled it to gain access to Fiat's technology, thus enabling Chrysler to produce the type of smaller cars the government wants manufactured, satisfy the demands of

unsecured creditors such as the VEBA trust and union laborers, and provide some of Chrysler's equity to the government – all components of a political agenda imposed on Chrysler's management. (Id.) In doing so, the President reversed the business judgment of Chrysler's management, which had determined a stand-alone reorganization was in the best interests of Chrysler's stakeholders. (Transcript of Hearing on First-Day Relief ("Hr'g Tr.") 122:13-124:21 (May 4, 2009))

15. Following the President's announcement, Chrysler began working at the behest of the U.S. Government to make the President's strategic vision a reality. (Kolka Aff. ¶¶ 84-85) Chrysler's agreement to this political agenda marked the end of independent management. In clear violation of its fiduciary duties, Chrysler stopped functioning as a private company and became an instrument of a third-lien lender, the U.S. Government.

V. Chrysler Files For Bankruptcy To Force Fiat Sale And Wipe Out Secured Debt

16. On April 30, 2009, the Debtors commenced these Chapter 11 cases. As with its other major business decisions, the timing of the filing and the venue were made by the government. (See Press Background Briefing on Auto Industry (April 30, 2009), www.whitehouse.gov/the_press_office/Background-Briefing-on-Auto-Industry-4/30/2009 (emphasis supplied)) Even though the cases were filed under chapter 11 of the Bankruptcy Code, it is very clear that the Debtors have no intention (or even possibility) of reorganizing these estates. Instead, the Debtors have filed the Sale Motion seeking approval to sell substantially all of their assets, free and clear of liens, to a newly formed company created for the purpose of this transaction ("New Chrysler"). (Sale Motion at 57; Kolka Aff. ¶ 88)

17. The purpose of this transaction is to transfer value from the Senior Secured Lenders' collateral to junior Chrysler stakeholders without regard to the well established legal priority of creditor claims. For example, though the Senior Secured Lenders will recover only

29% of their secured claim, Chrysler's unsecured creditors, including labor-related obligations, will receive over $20 billion over time. Robert Manzo, the Debtors' Chief Restructuring Officer testified that over $20 billion in liabilities would be assumed and paid out by New Chrysler with respect to worker and retiree healthcare and other benefits, prepetition auto parts and service supplier invoices, warranty and parts obligations, and pension obligations. (Hr'g Tr. 236:7-238:25; 242:16-244:20) In particular, the VEBA trust (which has an unsecured claim of approximately $10 billion), will receive a new note with a value of $4.5 billion as well as 55% of the equity interest in New Chrysler. (Hr'g Tr. 234:3-235:6) Fiat, one of the Debtors' foreign competitors, is slated to receive 20% of New Chrysler (with the right to acquire a total of 51%) in exchange for granting access to its "small car" technology. (Id.) Fiat is not paying any cash for its stake in New Chrysler. (Id.) The Treasury Department, a creditor with liens on the collateral that are still junior to those of the Senior Creditors, is slated to receive an 8% equity interest in New Chrysler. (Id.)

18. Following the sale the Debtors will cease to function as a going concern and will be left with only those assets New Chrysler deems essentially worthless. The Debtors describe the sale as of "substantially all" of their assets. (Id.)

19. Even though this transaction will reorder the economic interests of every Chrysler stakeholder, the Debtors have ignored fundamental issues related to this transaction. The Debtors made no effort to determine whether selling its assets to New Chrysler as a going concern would bring creditors a better recovery than a liquidation of Chrysler's component parts. (Hr'g Tr. 252:3-253:18) Indeed, the Debtors cannot make this judgment, as they claim not to know either the liquidation value or the going concern value of the company. (Hr'g Tr. 251:7-252:18) Given this, it is not surprising that the Debtors admit to not having considered its

fiduciary duty to work for the benefit of all stakeholders or how to protect against conflicts of interest among various stakeholders. (H'rg Tr. 256:23-258:1)

20. The Debtors have likewise ignored the structure of the sale transaction. The Debtors' chief financial officer does not know the value of New Chrysler, the amount of debt it can support, or the value of the New Chrysler stock being distributed under the sale transaction or why it was allocated as proposed in the Sale Motion. (Hr'g Tr. 235:9-236:6) The Debtors did not play any role in negotiating the capital structure of New Chrysler and did not decide what any of its stakeholders would receive as part of the transaction. (Hr'g Tr. 235:9-236:6; 246:10-19; 130:16-23)

21. The Debtors abdicated each of these critical management decisions to the Treasury Department, whose only legally cognizable interest in these cases is that of a third-lien lender.

VI. The Government Strong Arms Lenders To Consent To Its Plan

22. Unlike any other bankruptcy in history, Chrysler's bankruptcy was announced by the President of the United States. President Obama's announcement made clear that he had made the decision to put Chrysler into bankruptcy. He blamed this decision on certain Senior Secured Lenders that had not received TARP Funds and, therefore, had not bowed to government's pressure to accept an unfair 29 cents recovery where unsecured creditors were receiving all recoveries. The President branded those Senior Secured Lenders with fiduciary duties to their own investors as "speculators" who were unwilling to make "sacrifices." (www.whitehouse.gov/the_press_office/remarks-by-the-president-on-the-Auto-Industry 4/30/2009, attached as Exhibit C to the Fritz Decl.) He accused these lenders of refusing to compromise and instead seeking "an unjustified taxpayer-funded bailout." Id. This was not true.

23. First, the Senior Secured Lenders not accepting the unfair deal are not "speculators." They invested in first-lien secured debt, which is (or at least should be) a conservative investment. Second, certain of the Senior Secured Lenders did offer to compromise. They offered to accept a 50% reduction of their debt, even though they might receive a better recovery in chapter 7 liquidation. Their offer was in stark contrast to other Chrysler stakeholders, whose "compromise" will enable them to receive a much larger recovery then they are entitled to receive under the Bankruptcy Code. Finally, the Indiana Pensioners have never sought a government bailout. Indeed, they are among the few Chrysler stakeholders that can make that statement. Unlike Chrysler and the TARP banks, who accepted billions of taxpayer dollars, the Indiana Pensioners have never received a dime of bailout money from the government. To the contrary, it was the government that was taking from them. Under the government's plan, billions of dollars of collateral belonging to the Senior Secured Lenders will be taken away and given to unsecured and junior lien creditors and (ironically) Fiat, a foreign automaker. Because certain of Senior Secured Lenders asked to be paid for their interests in that collateral, they were vilified.

OBJECTION

I. The Proposed Sale Constitutes An Illegal *Sub Rosa* Plan That Distributes The Value Of The Collateral Among Creditor Classes

24. An expedited sale of substantially all of a debtor's assets, coupled with a distribution of the value derived from the sale to the debtor's creditors, and which effectively terminates the debtor's business, is universally recognized as an impermissible *sub rosa* plan of reorganization. Here, the proposed sale goes far beyond what courts permit on an expedited sale. And it is far more than a sale of assets to preserve the value of a wasting asset, the conventional rationale for expedited sales under section 363. Instead, the proposed sale transaction is part of a

multi-faceted plan that would allocate the value of the on-going enterprise and virtually all of its assets among creditor classes without the protections of the plan process.

A. The Debtors Attempt To Short Circuit The Plan Process

25. As shown below, courts have refused to approve Section 363 sales that "short circuit" the requirements of chapter 11. The proposed sale is designed primarily to benefit certain junior unsecured creditors, without affording the Senior Secured Lenders the protections and requirements of a plan, disclosure statement and confirmation procedures as contemplated in sections 1122 to 1129 of the Bankruptcy Code.

26. The seminal case prohibiting sales as *sub rosa* plans is Braniff: "The debtor and the Bankruptcy Court should not be able to short circuit the requirements of Chapter 11 for confirmation of a reorganization plan by establishing the terms of the plan *sub rosa* in connection with a sale of assets." PBGC v. Braniff Airways, Inc. (In re Braniff Airways, Inc.), 700 F.2d 935, 940 (5th Cir. 1983). In Braniff, the terms of the proposed sale included the issuance of scrip that would only be used in a plan and only to fund obligations to former employees and shareholders, that debt would be required to vote a portion of its deficiency claims in favor of any future plan approved by a majority of the Official Committee of Unsecured Creditors, and provide for releases in favor of Braniff and its directors and officers. Id. at 939-40. The court recognized the potential for mischief if a section 363 sale of substantially all of a debtor's assets is not closely scrutinized. The court held that where a proposed sale:

> attempts to specify the terms whereby a reorganization plan is to be adopted, the parties and the district court must scale the hurdles erected in Chapter 11…. Were this transaction approved, and considering the properties proposed to be transferred, little would remain save fixed based equipment and little prospect or occasion for further reorganization.

Id. at 940; see also In re Abbotts Dairies of Pa., 788 F.2d 143, 150 (3d Cir. 1986) (holding that the "good faith" requirement of a section 363 sale is to be used to assure that by means of an asset sale a debtor does not abrogate the protections afforded to creditors by section 1129 and the plan confirmation process.)

27. The court's analysis in In re Westpoint Stevens Inc., 333 B.R. 30 (S.D.N.Y. 2005), is particularly instructive with respect to the increased scrutiny that must be applied to the sale of substantially all of a company's assets outside the context of a chapter 11 plan. In Westpoint, the bankruptcy court approved a sale of substantially all of the debtors' assets in exchange for cash and a transfer of certain unregistered securities and subscription rights to acquire securities of the corporate parent of the purchaser. Id. at 33-34. The sale order (i) provided that certain secured creditors would receive replacement liens in the securities, (ii) placed a value on the securities, (iii) directed a distribution of a portion of the securities to the senior secured creditors in full and complete satisfaction of their claims, and (iv) a partial distribution of the securities to junior lienholders, free and clear of the senior secured lenders' liens. Id.

28. The first lien creditors appealed, arguing that the sale order converted more than $240 million of secured monetary claims against the debtors into an illiquid minority equity interest in the parent of successor entities of the debtor. Id. at 34. The district court for the Southern District of New York reversed, holding that the rights of the first lien creditors could not be abrogated and that the bankruptcy court lacked to authority approve such a transaction under Section 363. The court then warned of the dangers of a "powerful creditor" and debtor creating a proposed sale to create value for "favored constituencies" – the very situation the instant case presents:

> The Bankruptcy Court pointed to no authority, nor has this court despite the extensive research efforts of counsel and the undersigned's own chambers found any, standing for the proposition that an action in permanent derogation of a senior creditor's contractual rights can be forced upon that creditor for the purpose of providing 'adequate protection' to a junior creditor . . . . Taken to its logical extreme, the Bankruptcy Court's notion of adequate protection would allow a powerful creditor and a debtor anxious to achieve some value for its favored constituencies to run roughshod over disfavored creditors' rights, so long as a section 363(b) asset sale transaction could be defended as an exercise of reasonable business judgment in the context of dire economic circumstances.

Id. at 49-50.

29. The district court also reversed the provisions of the sale order relating to imposition of the distribution, claim satisfaction and lien-elimination provisions, holding that nothing in sections 363 or 105 of the Bankruptcy Code provides authority to impair the claim satisfaction rights of objecting creditors or to eliminate the replacement liens granted by the court. Id. at 55. Specifically, "section 363(b) is not to be utilized as a means of avoiding Chapter 11's plan confirmation procedures." Id. at 52. As the Westpoint court explained, "[w]here it is clear that the terms of a section 363(b) sale would preempt or dictate the terms of a Chapter 11 plan, the proposed sale is beyond the scope of section 363(b) and should not be approved under that section." Id.; see also Clyde Bergemann, Inc. v. The Babcock & Wilcox Co. (In re The Babcock & Wilcox Co.), 250 F.3d 955, 960 (5th Cir. 2001) ("[T]he provisions of § 363 . . . do not allow a debtor to gut the bankruptcy estate before reorganization or to change the fundamental nature of the estate's assets in such a way that limits a future reorganization plan."); Institutional Creditors of Continental Air Lines, Inc. v. Continental Air Lines, Inc. (*In re Continental Air Lines, Inc.*), 780 F.2d 1223, 1226-28 (5th Cir. 1986) ("When a proposed transaction specifies terms for adopting a reorganization plan, 'the parties and the district court must scale the hurdles erected in Chapter 11.' " (citations omitted) "[A] debtor in Chapter 11

cannot use § 363(b) to sidestep the protection creditors have when it comes time to confirm a plan of reorganization…”).

30. As the court further explained, Section 363 cannot be used to abrogate Chapter 11 plan protections: “If a debtor were allowed to reorganize the estate in some fundamental fashion pursuant to § 363(b), creditor’s [sic] rights under, for example 11 U.S.C. §§ 1125, 1126, 1129(a)(7), and 1129(b)(2) might become meaningless. Undertaking reorganization piecemeal pursuant to § 363(b) should not deny creditors the protection they would receive if the proposals were first raised in the reorganization plan.” Id.

31. The Westpoint court’s analysis on point here. Under the transaction proposed by the Debtors, the Debtors would sell substantially all of their assets—including the Collateral—to New Chrysler. The Debtors then propose that New Chrysler would provide the Indiana Pensioners with their pro rata share of $2 billion – far less then the current amount of $6.9 billion due and owing – while satisfying favored unsecured creditors in the amount of over $20 billion. (See Sale Motion, at ¶¶ 41 & 58) Just as in Westpoint Stevens, the Debtors cannot use Section 363 force the Senior Secured Lenders to take a distribution of other property in satisfaction of their liens. Such a transaction is an impermissible *sub rosa* plan that, if approved, would abrogate the Chapter 11 plan protections of Section 1129 of the Bankruptcy Code.

B. The Proposed Allocations Among Creditor Classes Violates The Priority Scheme Established By The Bankruptcy Code

32. The argument section in the Sale Motion dedicates the first five pages to the proposition that reorganization is an important object of bankruptcy. Reorganization is an important goal of bankruptcy, but the Debtors conveniently ignore that the equity remedies in a chapter 11 case to achieve this goal are circumscribed by the Bankruptcy Code. Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 202 (1988). The U.S. Supreme Court in Ahlers rejected a

plan which sought to favor certain equity holders over certain creditors based on the purported contribution of future "labor, experience, and expertise." Id. at 199, 204-05. The court held that "whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code" and that a "fair and equitable" reorganization is one which complies with the Bankruptcy Code. Id. at 206-207.

33. Here, the Debtors specifically seek to obtain the benefits of the section 1129 confirmation process, through an accelerated section 363 transaction, while flatly ignoring the requirements and creditor protection of section 1129 of the Bankruptcy Code.[2] Among other things, allowing the Debtors to ignore the priority scheme established by the Bankruptcy Code while selling substantially all of their assets, in permanent derogation of the Indiana Pensioners Lenders' property rights, would turn the law on its head.[3] Accordingly, the sale should not be approved except through the plan process, which assures creditors and other parties in interest full disclosure, the opportunity to vote on their fates and the protections of a fully noticed confirmation process. Indeed, as an initial matter, the Agent has taken the position that the objecting secured lenders do not even have the right to object because the Credit Agreement permits the sale to be approved by Required Lenders (51%) and such approval has already been obtained. Clearly, such an argument would be irrelevant if the transaction were properly put forth as a plan, and the very fact that the argument is being made is evidence of the fact that the

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[2] Section 1129(b)(1) of the Bankruptcy Code requires, among other things, that a plan does not discriminate unfairly among similarly situated creditors and is fair and equitable. Here, the proposed transaction violates both principles. Not only does the transaction improperly provide value to unsecured creditors at the expense of Senior Secured Lenders, such as the Indiana Pension Fund, but it also favors certain unsecured creditors over others, including any potential deficiency claims.

[3] The absolute priority rule is a fundamental tenet of bankruptcy law. The absolute priority rule provides that "the holder of any claim or interest that is junior to the claims of [a] class will not receive or retain under the plan on account of such junior claim or interest any property." In re Adelphia Communications Corp., 544 F.3d 420, 427 n. 5 (2d. Cir. 2008) (citing 11 U.S.C. § 1129(b)(2)(B)(ii)) (internal quotations omitted). "A court may approve such a compromise or settlement only when it is fair and equitable." Id. (internal citations omitted). "The words 'fair and equitable' are terms of art-they mean that 'senior interests are entitled to full priority over junior ones.'" Id. (citing SEC v. Am. Trailer Rentals Co., 379 U.S. 594 (1965); Protective Committee v. Anderson, 390 U.S. 414 (1968)).

transaction has at least in part been structured so as to eliminate (or clearly has the effect of eliminating) voting and objection rights that would otherwise exist. Moreover, if a majority in number rejected the plan, then the plan could only be confirmed if the secured lenders got the indubitable equivalent for their secured claims, and to the extent that did not reflect their full claim amount, their deficiency claim could not be unfairly discriminated against vis-a-vis other pari passu unsecured claims (such as trade claims and the VEBA claim). The pending sale provides no such protection before substantially all the value of the estate is distributed out to other stakeholders in satisfaction of their claims.

34. The flaw in the Debtors' logic in support of the sale is further exposed by the fact that the lenders' secured claims are supposedly getting full satisfaction (based on a disputed liquidation value of $2 billion). First of all, in a contested plan confirmation process, the Senior Secured Lenders would be able to fully test and challenge the debtors' view of liquidation value; an opportunity the present process deprives them of. More importantly, however, assuming the validity of the Debtors' view, there is no provision for the treatment of the lenders' $5 billion deficiency claim even though substantial other unsecured claims are going to receive significant consideration. Results so patently offensive to the fundamental principles of the chapter 11 process should not be permitted--at least not without all the protections of the chapter 11 plan process.

II. The Government's Actions Exceed Its Statutory Authority and Are Improper

35. It is axiomatic that the Executive Branch's authority must derive either from an act of Congress or from the Constitution itself. Youngstown Sheet & Tube Co., 343 U.S. 579, 585 (1952). As cautioned by Justice Jackson in Youngstown, in language that is equally applicable here:

> That comprehensive and undefined presidential powers hold both practical advantages and grave dangers for the country will impress anyone who has served as legal adviser to a President in time of transition and public anxiety.
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> * * *
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> The opinions of judges, no less than executives and publicists, often suffer the infirmity of confusing the issue of a power's validity with the cause it is invoked to promote, of confounding the permanent executive office with its temporary occupant. The tendency is strong enough to emphasize transient results upon policies – such as wages or stabilization – and lose sight of enduring consequences upon the balanced structure of our Republic.

36. It is this very infirmity that the Government apparently seeks to exploit in this case. The assault on the contract rights of the senior lenders here is of particular concern. As James Madison wrote n the Federalist Papers in 1788, "laws impairing the obligation of contracts are contrary to the first principles of the social compact, and to every principle of sound legislation." THE FEDERALIST No. 44 (James Madison).

37. Here, the Executive Branch relies on TARP. TARP, however, limits the spending to purchases of "troubled assets" of "financial institution[s]" only. 12 U.S.C. § 5211(a). Those definitions must be followed. See Stenberg v. Carhart, 530 U.S. 914, 942 (2000). Here, the Emergency Economic Stabilization Act ("the EESA") was explicit that troubled assets only were to be purchased from "financial institution[s]." 12 U.S.C. § 5211(a)(1).

38. Chrysler is an automotive company, and plainly not a financial institution. Remarkably, the Treasury Department proceeds on the position that TARP funds can be used to purchase assets of "any institution" that is "established and regulated under the laws of the United States and have significant operations in the United States." Attached as Exhibit B to the Statement of the United States Department of the Treasury in Support of the Commencement of Chrysler LLC's Chapter 11 Case [Docket No. 69]. The Treasury Department has simply read out of the definition of "financial institution" any reference to "financial" as well as the list of

representative financial institutions that confirms the limits on the scope of TARP. 12 U.S.C. § 5202(5).

39. The Treasury Department's "interpretation" eviscerates the clear Congressional intent of TARP and is squarely at odds with well-settled principles of statutory construction concerning the definition of "financial institution" as set forth in the EESA. If the phrase "any institution" were to be interpreted to mean literally any institution of any nature, regardless of whether it was financial in nature, the qualifier "financial" and the listing of types of financial institutions that follows would be utterly meaningless and effectively written out of the statute. See Leocal v. Ashcroft, 543 U.S. 1, 12 (2004) ("we must give effect to every word of a statute wherever possible").[4]

40. The EESA's listing of types of financial institutions – "any bank, savings association, credit union, security broker or dealer, or insurance company" – further demonstrates that Chrysler is not a financial institution. The Bank Holding Company Act

[4] In Hibbs v. Winn, 542 U.S. 88, 101 (2004), the Supreme Court examined whether the term "assessment" in the phrase "enjoin, suspend or restrain the assessment, levy or collection of any tax under State law" was so broad as to signify the entire taxing plan. In rejecting that view, the Court explained:

> We do not focus on the word "assessment" in isolation, however. Instead, we follow "the cardinal rule that statutory language must be read in context [since] a phrase gathers meaning from the words around it." General Dynamics Land Systems, Inc. v. Cline, 540 U.S. 581, 596, 124 S.Ct. 1236, 1246, 157 L.Ed.2d 1094 (2004) (internal quotation marks omitted). In § 1341 and tax law generally, an assessment is closely tied to the collection of a tax, i.e., the assessment is the official recording of liability that triggers levy and collection efforts.
>
> The rule against superfluities complements the principle that courts are to interpret the words of a statute in context. See 2A N. Singer, Statutes and Statutory Construction § 46.06, pp. 181-186 (rev. 6th ed. 2000) ("A statute should be construed as that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . ." (footnotes omitted)). If, as the Director asserts, the term "assessment," by itself, signified "[t]he entire plan or scheme fixed upon for charging or taxing," Brief for Petitioner 12 (quoting Webster's New International Dictionary of the English Language 166 (2d ed. 1934)), the TIA would not need the words "levy" or "collection"; the term "assessment," along, would do all the necessary work.

See also Rapanos v. United States, 547 U.S. 715, 731-32 (2006) (noting that the qualifier "navigable" in the term "navigable waters" is not devoid of significance).

("BHCA") also illustrates the definition of financial institution. The BHCA defines the numerous activities to be considered "financial in nature" as including:

> (A) Lending, exchanging, transferring, investing for others, or safeguarding money or securities.
>
> (B) Insuring, guaranteeing, or indemnifying against loss, harm, damage, illness, disability, or death, or providing and issuing annuities, and acting as principal, agent, or broker for purposes of the foregoing, in any State.
>
> (C) Providing financial, investment, or economic advisory services, including advising an investment company (as defined in section 3 of the Investment Company Act of 1940 [15 U.S.C.A. § 80a-3]).
>
> (D) Issuing or selling instruments representing interests in pools of assets permissible for a bank to hold directly.
>
> (E) Underwriting, dealing in, or making a market in securities.
>
> (F) Engaging in any activity that the Board has determined, by order or regulation that is in effect on November 12, 1999, to be so closely related to banking or managing or controlling banks as to be a proper incident thereto (subject to the same terms and conditions contained in such order or regulation, unless modified by the Board).
>
> (G) Engaging, in the United States, in any activity that—
>
> > (i) a bank holding company may engage in outside of the United States; and
> >
> > (ii) the Board has determined, under regulations prescribed or interpretations issued pursuant to subsection (c)(13) of this section (as in effect on the day before November 12, 1999) to be usual in connection with the transaction of banking or other financial operations abroad.

12 U.S.C. § 1843(k)(4).[5] All of these types of described financial activities overlap with and encompass the types of institutions listed in the EESA. *See* 12 U.S.C. § 5202(5).

41. That TARP was aimed at financial institutions – that is the types of already regulated institutions listed in the TARP definition of "financial institution" – and not auto

[5] The BHCA also includes certain other categories of activity that are considered "financial in nature," which relate to certain types of potential acquisitions by bank holding companies, and do not affect the analysis here. *See* 12 U.S.C. § 1843(k)(4)(H)-(I).

manufacturers – is confirmed by the other sections of EESA which expand previously authorized statutory mandates for the Federal Reserve, FDIC and Treasury Department. *See* 12 U.S.C. §§ 5233 (EESA § 126 regarding FDIC authority), 5235 (EESA § 129 regarding the Federal Reserve's loan authority), 5236 (EESA § 131 regarding the Treasury's authority as to the Exchange Stabilization Fund), and 5241 (regarding an increase in FDIC deposit and share insurance).

42. In his testimony before Congress on November 18, 2008, Treasury Secretary Paulson's unequivocally stated that the automotive manufacturers fell outside the purpose of TARP. (See Oversight of Implementation of the Emergency Economic Stabilization Act of 2008 and off Government Lending and Insurance Facilities; Impact on Economy and Credit Availability*:* Hearing Before the H. Comm. on Fin. Servs., 110th Cong. 19 (Nov. 18, 2008).

43. The House of Representatives further reiterated this inescapable conclusion when it attempted to authorize the Executive Branch to bailout the automotive manufacturing industry after enacting TARP. The Auto Industry Financing and Restructuring Act, H.R. 7321, 110th Cong. § 10 (2008), passed by the House of Representatives attempted, and failed, to authorize the Executive to do what the Treasury Department is attempting to do here. But that legislation failed in the Senate, so the Executive Branch (including the Treasury Department) never received Congressional authorization to bail out auto manufacturers, as it is attempting to do here.

44. Notwithstanding all of this, the Treasury Department is simply charging ahead without any statutory or constitutional authority, apparently banking on the hope that the secured creditors will just fall in line with the Government's political and policy determinations. But the Government's bullying does not provide it with authority where none exists and it does not eliminate the rights of those still willing to stand up and object to what is transpiring here.

A. The Sale Motion Violates The Plain Language Of The EESA And Is An Unconstitutional Taking

45. TARP also contains express language prohibiting the impairment of the Senior Lenders' rights, which is being attempted through the guise of the 363 sale. Section 119(b)(2) of the EESA provides that "[a]ny exercise of the authority of the Secretary pursuant to this chapter shall not impair the claims or defenses that would otherwise apply with respect to persons other than the Secretary." 12 U.S.C. § 5229(b)(2).

46. As discussed above, if the Debtors are successful obtaining approval of the section 363 sale, the estate will receive $2 billion, which would be distributed to the Senior Lenders, representing 29% on their secured debt. Meanwhile, New Chrysler would receive billions of dollars in new loans based on the very same Collateral which would allow New Chrysler to repay or assume many of the Debtors' former unsecured creditors at or close to par – and at a higher recovery rate than paid to the Senior Lenders **or** than those creditors would have received under a chapter 11 plan. As such, the Debtors' plan is to use section 363 to strip itself of the assets pledged to the Senior Lenders and put those assets to the benefit of unsecured creditors **instead of** the Secured Lenders **even though** the Senior Lenders will not have been paid in full (including on any unsecured deficiency claims).

47. By mandating a treatment of the Debtors' assets that precludes any unsecured deficiency claims of the Senior Debt from being paid while allowing inferior creditors to receive substantial value from the estate, the Treasury Department also is causing the Debtors to ignore the priority rules embodied in the Bankruptcy Code as applied by the Supreme Court in Bank of America Nat'l Trust & Sav. Ass'n v. 203 North LaSalle Street Partnership, 526 U.S. 434 (1999). There, the court held that a debtor could not refuse to consider alternative plan structures where the plan proposed permitted debtor's pre-bankruptcy equity holders, over the objection of a

senior secured class of creditors, to contribute new capital and receive ownership interests in the reorganized entity while the senior creditor's unsecured deficiency claims went unpaid. As noted above, that is exactly what is being mandated here by the proposed 363 sale transaction being scripted by the Treasury Department.

48. Not only do the Government's actions far exceed its statutory authority, they also subject the Government to potential lender liability and equitable subordination actions. "[A] creditor will be held to an insider standard where it is found that it dominated and controlled the debtor." Official Comm. Of Unsecured Creditors of the Debtors v. Austin Fin. Servs. (in re KDI Holdings, Inc.), 277 B.R. 493, 511 (Bankr. S.D.N.Y. 1990). When such a creditor overwhelmingly dominates the debtor, there is a merger of identity and the creditor will be held to a fiduciary standard. Id. at 512; see also Schubert v. Lucent Techs., Inc. (In re Winstar Commc'ns, Inc.), 554 F.3rd 382, 411-12 (3d Cir. 2009) (finding "egregious" conduct where the creditor had exerted such influence and control as to qualify as an "insider" acting to the detriment of other creditors); In re Process-Manz Press Inc., 236 F. Supp. 333 (N.D. Ill. 1964) (upholding the Referee's ruling that the claimant was "in substance the owner" of the bankrupt and therefore a fiduciary), rev'd on jurisdictional grounds, 369 F.2d 513 (7th Cir. 1966).

49. Here, the Government has taken control over Chrysler's business, and has used that control to impose its own plan of reorganization at the expense of other creditors. This would normally subject a party to liability. See, e.g., Melamed v. Lake County Nat'l Bank, 727 F.2d 1399 (6th Cir. 1984) (finding that lender's actions to "salvage" the corporate borrower were sufficient to state a claim of tortious interference with the debtor's business relationships).

50. The Supreme Court long ago recognized that a secured creditor's interest in specific property is protected in bankruptcy under the Fifth Amendment. Louisville Joint Stock

Land Bank v. Radford, 295 U.S. 555, 589, 594 (1935). That case involved a Depression-era statute that was intended to help bankrupt farmers avoid losing their land in mortgage foreclosure. But rather than mandate some form of moratorium, which had been upheld, see Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934), the statute in Radford took a unique approach to the bankruptcy process. The bankrupt debtor could achieve a release of the security interests either (i) with the lender's consent, purchasing the property at its then appraised value by making deferred payments for two to six years at statutorily-set interest rates; or (ii) if the lender refused the purchase option, by having the bankruptcy court stay the proceedings for up to five years during which time the debtor could use the property by paying a rent set by the court, which payments would be for the benefit of all creditors, with a purchase option at the end of that period. Id. at 575-76.

51. Justice Brandeis noted that the "essence of a mortgage" is the right of the secured party "to insist upon full payment before giving up his security [i.e., the property pledged]." Id. at 580. In invalidating the statute, the Court noted that no bankruptcy law had ever "sought to compel the holder of a mortgage to surrender to the bankrupt either the possession of the mortgaged property or the title, so long as any part of the debt thereby secured remained unpaid." Id. at 581-82. Commenting on the law allowing the debtor to repay less than the full amount owing and keep the property, the Court also noted that no prior law had "attempted to enlarge the rights or privileges of the mortgagor as against the mortgagee" including by going beyond reducing the debtor's liabilities to "supply [the debtor] with capital with which to engage in business in the future." Id. at 582.

52. Holding that secured creditors could not be treated this way, the Court stated that "[t]he bankruptcy power . . . is subject to the Fifth Amendment," and that the pernicious aspect

of this law was its "taking of substantive rights in specific property acquired by the bank prior to the act." Id. at 589-90.[6] Thus, Congress could not pass a law that could be used to deny to secured creditors their rights to realize upon the specific property pledged to them or "the right to control meanwhile the property during the period of default." Id. at 595.[7] That is precisely what the Treasury Department would have Chrysler do here.

53. The Treasury Department is demanding that the Collateral be stripped away from the Secured Lenders' liens – thereby impairing the rights of the Secured Lenders to realize upon those assets – so that it may be put in New Chrysler. The plan is then to use those assets to benefit unsecured creditors in this proceeding, who will then recover substantially more than the Secured Lenders, who also will realize nothing on their unsecured deficiency claims. Radford specifically disallowed this type of procedure as antithetical to the idea of a lien on property. That the Treasury Department would do this to help the United States address difficult economic times is not an answer. Indeed, the same justification was expressly rejected in Radford, where Justice Brandeis noted that a statute which violated secured creditors' rights, but which was passed for sound public purposes relating to the Great Depression, could not be saved because "the Fifth Amendment commands that, however great the nation's need, private property shall not be thus taken even for a wholly public use without just compensation." Id. at 602.

B. The EESA And TARP Do Not Authorize The Government to Control Chrysler Or Its Bankruptcy

[6] The legislative history relating to adequate protection under section 363 echoes this commitment under the Fifth Amendment to protecting the value of property pledged to secured creditors. *See* S. Rep. No. 95-989, at 49, 53, *reprinted in* 1978 U.S.C.C.A.N. 5787, 5835, 5839 (citing Radford and finding that "the purpose of the section is to insure that the secured creditor receives the value for which he bargained"); H.R. Rep. No. 95-595, at 339, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6295 (to similar effect).

[7] Tellingly, in Wright v. Union Central Life Ins. Co., 311 U.S. 273, 278 (1940), the Court upheld the revised version of the statute at issue in Radford based on safeguards "to protect the rights of secured creditors, throughout the proceedings, to the extent of the value of the [pledged] property."

(i) Even assuming *arguendo* that TARP funds could be used to purchase troubled assets of car manufacturers rather than financial institutions and did not otherwise improperly impair Movants' rights, the statute still would not allow Treasury to take effective possession of Chrysler, impose new management and dictate the terms of its continued operations and ultimate survival. See Youngstown, 343 U.S. at 588-89. There is no statutory authority for the Treasury's actions in effectively causing the marshaling and sale of the Debtors' assets by way of a particular sale process so as to ensure that Movants' rights as first lien secured lenders are paid only 29 cents on the dollar and their unsecured deficiency claims left unpaid while also ensuring that unsecured creditors who have no secured status are paid in full or receive equity in New Chrysler. This may be the type of authority that the Treasury or its sub-agencies may exercise with respect to financial institutions, but those powers come with specific Congressional authorization and are expressly limited by the scope of the enabling statutes in question. The very specificity of those statutes shows that Congress knows how to cloak an agency with such powers – something Congress never did in the EESA or TARP. See, e.g., 12 U.S.C. § 1821(d)(2) (powers of FDIC with respect to failed depositary institutions); 45 U.S.C. 701, et seq. ("Railroad Reorganization Act") (establishing detailed procedures for railroad reorganizations under the bankruptcy laws); 11 U.S.C. § 1163 (detailing authority of Transportation Secretary in railroad bankruptcy proceeding).

(ii) Absent such express statutory authority even the federal banking regulators do not have unlimited power in marshaling assets and classifying creditors. See, e.g., Wheeler v. Greene, 280 U.S. 49 (1929) (Federal Farm Loan Bank as receiver had no authority under statute to maintain suit to enforce stockholders' liability); Sharpe v. F.D.I.C., 126 F.3d 1147, 1155 (9th Cir. 1997) (FDIC exceeded statutorily granted powers in attempting to record a reconveyance of the debtor's deed of trust for which it did not pay full consideration); Adagio Inv. Holding Ltd. v. F.D.I.C., 338 F. Supp.2d 71, 73 (D.D.C. 2004) (noting broad FDIC powers under section 1821, but finding that "none of these broad powers encompasses the right to reclassify deposits without authorization…"). TARP contains no reference – or even hint – of Treasury Department authority to direct the course of a Chapter 11 proceeding as to a private company like Chrysler.

C. <u>This Proceeding Also Violates The EESA's Conflict Of Interest Rules</u>

54. The EESA also provides that in acting the Treasury Department must avoid conflicts of interest, and must issue regulations designed to manage or prohibit conflicts. 12 U.S.C. § 5218. The relevant regulations relating to the EESA and TARP are found in 31 C.F.R. Part 31. There, Treasury Department defined a conflict of interest, *inter alia*, as "a situation in which [a] retained entity has an interest or relationship that could cause a reasonable person with knowledge of the relevant facts to question the retained entity's objectivity or judgment to perform under the arrangement." 31 C.F.R. § 31.201. It also prohibited concurrent conflicts of interest: "[i]f [a] retained entity advises Treasury Department with respect to a program for the purchase of troubled assets, the retained entity, management officials performing work under the arrangement, and key individuals shall not, during the term of the arrangement, sell or offer to sell, or act on behalf of anyone with respect to a sale or offer to sell, any assets to Treasury under the terms of that program." 31 C.F.R. § 31.214.

55. Here one of the Government's key legal advisors is Simpson, Thacher & Bartlett LLP ("STB"). Starting in October 2008, and continuing through the present, STB entered into two contracts with the Treasury Department to provide it with a broad range of legal advice with regard to the implementation of the TARP program, including "guidance in the development of equity and debt investments and co-investment programs instituted pursuant to the Emergency Economic Stabilization Act of 2008." *See* Gluckman Declaration, Exhibit **[ ]**. In this

proceeding, however, STB is now representing the agent for all the Senior Secured Debt that has acted to solicit consents for the very actions being pursued by the Treasury which violate EESA. *See* Comments of Peter V. Pantaleo, Esq., May 4, 2009, Transcript of Hearing at 28, In the Matter of Chrysler LLC, et al. (No. 09-50002). ("JPMorgan is the first lien administrative agent. . . . [A]t the company's request in concluding negotiations over the amount by which the required lenders would agree to liquidate the collateral in this case in the context of a sale to Fiat, the agent solicited written consents from each of the holders of the first lien debt"). Neither the government nor the Debtors have provided any explanation as to why this overlapping representation does not create an improper conflict of interest that also infects these proceedings.

III. A Sale Of Substantially All Of A Debtor's Assets Is Subject To Close Scrutiny And A Heightened Burden, That Debtors Fail To Satisfy

56. Section 363(b)(1) provides the general authority for a debtor to sell assets outside the ordinary course of business. However, when a debtor proposes to sell substantially all of its assets and without the structure of a chapter 11 disclosure statement and plan, courts impose higher scrutiny, recognizing that such a sale constitutes an essential termination of the debtor's on-going business, leaving only the orderly distribution of the sale proceeds to be performed under the law governing the priority of creditors.

A. Close Scrutiny And A Heightened Burden Apply

57. Courts are required to ensure that a debtor does not use the cover of a section 363 sale to effect a plan of reorganization without compliance with the rigors mandated in a judicial confirmation of a plan. In re Channel One Communications, Inc., 117 B.R. 493, 496 (Bankr. E.D. Mo. 1990) (citing In re Industrial Valley Refrigeration & Air Conditioning Supplies, Inc., 77 B.R. 15, 17 (Bankr. E.D. Pa. 1987) (the transaction "must be closely scrutinized and the proponent bears a heightened burden of proving the elements necessary for authorization.")); In

re Wilde Horse Enterprises, Inc., 136 B.R. 830, 841 (Bankr. C.D. Cal. 1991); Western Auto Supply Co. v. Savage Arms, Inc., 43 F.3d 714, 720 n.9 (1st Cir. 1994) (order confirming a chapter 11 liquidation sale warrants special "bankruptcy court scrutiny"); 3 COLLIER ON BANKRUPTCY, ¶ 363.02[3]; see also (citing, e.g., Stephens Indus., Inc. v. McClung, 789 F.2d 386 (6th Cir. 1986) (due to the fact that "there is some danger that a section 363 sale might deprive parties of substantial rights inherent in the plan confirmation process, sales of substantial portions of a debtor's assets under section 363 must be scrutinized closely by the court")); In re CGE Shattuck, LLC, 254 B.R. 5, 12 (Bankr. D. N.H. 2000) (looking through form to substance and rejecting creditor disclosure that would circumvent the requirements of chapter 11 of the Bankruptcy Code).

58. The Debtors must prove the following elements to gain approval of the Sale Motion: (1) the existence of a sound business purpose for conducting the sale without a disclosure statement and plan; (2) there has been accurate and reasonable notice of the sale; (3) the price to be paid is fair and reasonable; and (4) the sale will not unfairly benefit insiders or the prospective purchasers, or **unfairly favor a creditor or class of creditors**. Channel One, 117 B.R. at 496 (emphasis added); see also In re Engman, 395 B.R. 610, 620 (Bankr. W.D. Mich. 2008) (sales must be "fair and reasonable in price and made in 'good faith'" and must be "in the best interests of the estate and creditors") (internal quotations and citations omitted). As demonstrated below, the Debtors cannot satisfy the required elements of a section 363 sale.

1. No Sound Business Purpose Exists For Approval Of The Sale Motion And Redistribution Of Value

59. To determine if an asset sale under section 363(b) is permissible, the "judge determining [the] § 363(b) application [must] expressly find from the evidence presented before him [or her] at the hearing [that there is] a good business reason to grant such an application."

Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.), 722 F.2d 1063, 1070-1 (2d Cir. 1983) (a debtor should not sell substantially all of its assets outside the ordinary course of business under section 363(b) absent an "articulated business justification"); see also Stephens Indus., Inc., v. McClung, 789 F.2d 386, 390 (6th Cir. 1986); In re Montgomery Ward Holding Corp., 242 B.R. 147, 153 (D. Del. 1999); In re Exaeris, Inc., 380 B.R. 741, 744 (Bankr. D. Del. 2008). Here, no legitimate reason exists to take value properly belonging to the Indiana Pensioners and distribute it to unsecured and junior creditors. Although the Debtors claim that they are preserving "going concern" value, they have no intention of remaining a going concern. Instead, they plan to sell everything to New Chrysler, which entity ultimately will benefit from any "going concern" valued purchased by paying junior claims. Preservation of value for a non-Debtor to the detriment of Senior Secured Lenders hardly can be considered a good business reason for the estates.

60. Indeed, the Debtors have produced no evidence indicating why the proposed transaction could not be accomplished in a plan process other than such sale likely would not satisfy the Chapter 11 confirmation standards. Courts should not approve proposed sales under section 363, however, when the proposed transaction would not be approved if proposed in a plan. See Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 450 (1968) (finding that expedition does not justify abandoning proper standards); In re Continental Airlines, Inc., 780 F.2d 1223, 1226 (5th Cir. 1986) ("When a proposed transaction specifies the terms for adopting a reorganization plan, the parties and the district court must scale the hurdles erected in Chapter 11.") (internal citation omitted); In re Lionel Corp., 722 F.2d 1063, 1071 (2d Cir. 1983) (rejecting proposed sale because it "ignores the equity interests required to be weighed and considered under Chapter 11" and holding that "[t]he

need for expedition…is not justification for abandoning proper standards") (internal citation omitted).

2. <u>The Debtors Did Not Provide Accurate And Reasonable Notice</u>

61. The Debtors acted as if they were selling a Chrysler LeBaron and not a multinational corporation with billions of dollars in assets. Indeed, the sales procedures proposed by the Debtors were designed to do nothing more than give the appearance of legitimacy to the proposed sale that is nothing more than an illegal *sub rosa* plan. The sales procedures effectively precluded anyone but the government from bidding on the Debtors' assets, and thus, were inherently unfair and did not comply with the fundamental purpose for bidding procedures – to maximize the sale price for the Debtors' assets.

62. The sale procedures provided just over one week for potential bidders to put in a final offer for substantially all of the Debtors' assets with no due diligence or financial contingency. The Debtors themselves recognize this to be absurd. For example, Scott R. Garberding, Senior Vice President and Chief Procurement Officer, testified that it took four months and over 200 people to put the Fiat deal together, and acknowledged that a one-week time period is an enormously shortened time period for a multibillion dollar transaction. (Hr'g Tr. at 89-92) Mr. Garberding also agreed that one week to conduct due diligence and come forward with a bid would eliminate bidders. (Hr'g Tr. at 97)

63. To compound the absurdity of seeking bids within a week, the Debtors mandated virtually every term of a potential bid, with each restriction designed not to generate bids but rather to discourage them. For example, the Debtors required that the purchase price and terms as well as the conditions of bids be substantially the same as those set forth in the proposed Purchase Agreement (even requiring a "redline" of any proposed agreement reflecting changes against the Purchase Agreement). The Debtors required bids to be made without the protection

of any due diligence, financing contingencies, or other bid protections, another absurdity for bids amounting to billions of dollars. Finally, the Debtors required a bidder to assume billions in liabilities held by certain favored unsecured creditors, and assume certain collective bargaining agreements, whether or not doing so maximizes value for the estates. Debtors cannot establish a business reason for requiring competing bids that includes terms that provide no benefit to the estate, and such requirement simply demonstrates that the Debtors are not exercising any business judgment, but are merely implementing the direction of the Treasury Department.

64. Also telling is that the sale procedures provided broad rights to reject bids upon consultation with, among others, the Treasury Department—one of the sponsors of the Debtors' proposed sale transaction. The sale procedures simply further evidence the Debtors' and the U.S. Government's attempt to push through this Court the prearranged government/Chrysler/UAW/Fiat *sub rosa* plan, without concern for the law.

3. <u>The Sale Price Is Not Fair And Reasonable</u>

65. No evidence exists regarding what value the Debtors could receive, outside of the proposed sale the Debtors and the government are bulldozing through this Court. Indeed, the Debtors' own analysis indicates that a liquidation of the Debtors (who, according to the Sale Motion at ¶11, had assets of over $39 billion as of December 31, 2008) could achieve more value for the Senior Secured Lenders. Hr'g Tr. 235:9—236:6. Even more importantly, though, aside from the sale price itself, it is the allocation of proceeds that is grossly unfair to the Indiana Pensioners, as discussed in section 5 below.

4. <u>The Sale And Redistribution Of Value Unfairly Benefits Insiders Or The Prospective Purchaser</u>

66. Importantly, the sale of assets by the Debtors to New Chrysler is not a sale that was negotiated by independent parties at arms' length. Rather, it is a sale that was orchestrated

entirely by the Treasury Department and foisted upon the Debtors without regard to corporate formalities, the fiduciary duties of the Debtors' officers and directors or the other important checks and balances typically found in good faith sales. Indeed, well before the filing, the Debtors had ceased to function as an independent company and had become an instrumentality of the government. President Obama, in his public statements made it clear that the Debtors would be required to pursue the sale transaction with Fiat and ordered the Debtors to cease all efforts to pursue any other transaction. Both actions are clearly inconsistent with the requirements of a good faith sale. And the government exerted extreme pressure to coerce all of the Debtors' constituencies into accepting a deal which is being done largely for the benefit of unsecured creditors at the expense of senior creditors. Under the circumstances, New Chrysler simply cannot establish that it is a good faith purchaser in connection with the proposed sale.

5. The Sale And Redistribution Of Value Favors Certain Creditors And/Or Classes Of Creditors And Is Unfair

67. A fundamental tenet of bankruptcy law is that unfair treatment of creditors is prohibited, and that the debtors bear the burden to prove that creditors are being treated fairly. Channel One, 117 B.R. at 496; see also In re Engman, 395 B.R. at 620 (sale must be made in "good faith" and must be "in the best interests of the estate and creditors"); In re Dow Corning Corp., 198 B.R. 214, 222 (Bankr. E.D. Mich. 1996) (sale must be "fair and equitable," "in good faith" and "in the best interests of the estate"). The Debtors cannot show that the proposed sale treats the Senior Secured Lenders fairly.

68. The proposed sale fails to satisfy the heightened standards applicable to sales in substantially all a debtor's assets. As addressed above, (i) the proposed sale violates absolutely priority, (ii) was not negotiated in good, (iii) does not serve the best interest of the estate and

creditors (other than certain unsecured creditors), (iv) is an illegal *sub rosa* plan, and (v) eliminates all of the protections of a Chapter 11 reorganization. See supra.

IV. The Debtors Have Failed To Satisfy The Requirements Of 11 U.S.C. § 363(f)

69. A sale free and clear of third party interests must comply with one of the provisions of section 363(f)(1) though (5). Here, the Debtors rely on subsections (2) and (3)[8] that provide as follows:

> (2) such entity consents;
>
> (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property.

The Debtors' proposed sale does not comply with any of these requirements.[9]

A. The Debtors Have Failed To Satisfy 11 U.S.C. § 363(f)(2)

70. Section 363(f)(2) authorizes a sale free and clear of the Senior Secured Lenders' liens only if "such entity consents." 11 U.S.C. § 363(f)(2). "There is no indication within Section 363 itself or its underlying legislative history that Congress intended 'consents' to have any meaning other than that which it is commonly understood to have. 'Consent,' when used as a verb, means 'to give assent or approval.'" In re Roberts, 249 B.R. 152, 155 (Bankr. W.D. Mich. 2000) (citing Webster's Third New International Dictionary (unabridged) (1986)) "[C]onsent' [as used in § 363(f)(2)] obligates the trustee to approach the lienholder and secure the lienholder's assent if the trustee wishes to sell the property free and clear of the lien." Id.

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[8] To the extent that the Debtors seek to argue for approval under section 363(f)(5) in footnote 10 of the Sale Motion, that argument fails. Section 363(f)(5) applies only where the secured party can be compelled to have its lien replaced by a payment or some other interest that provides adequate protection. 11 U.S.C. § 363(f)(5); 3 Collier on Bankruptcy, ¶ 363.06[6]; see also Clear Channel Outdoor 391 B.R. at 39-40, 44-45 (363(f)(5) applies only when a proceeding exists to force a creditor's interest to be completely satisfied without full payment of the amount owed such as a liquidated damages clause or a buy-out arrangement among partners); see also, Richardson v. Pitt County (In re Stroud Wholesale, Inc.), 47 B.R. 999, 1003 (E.D.N.C. 1985), aff'd without opinion, 983 F.2d 1057 (4th Cir. 1986) ("money satisfaction" as used in section 363(f)(5) means full satisfaction of an interest).

[9] The Sale Motion does not seek relief under 11 U.S.C. § 363(f)(1) or (4).

When a debtor attempts to sell estate property free and clear of the liens of multiple lienholders pursuant to section 363(f)(2), the debtor must obtain unanimous consent from all lienholders. See In re Mulberry Corp., 265 B.R. 468, 469 (Bankr. M.D. Fla. 2001) (denying a motion to sell estate property free and clear of multiple liens pursuant to section 363(f)(2) on grounds that the debtor failed to obtain unanimous consent of all lienholders to the proposed sale); see also In re Bobroff, 40 B.R. 526, 528 n.3 (Bankr. E.D. Pa. 1984).

71. Here, the Indiana Pensioners oppose the sale. Thus, the Debtors fail to satisfy the standard required by section 363(f)(2). To the extent the Debtors contend that consent has somehow been conferred through the Administrative Agent, that contention is misplaced. The Indiana Pensioners are parties in interest and have not consented. Moreover, the loan agreement between the Debtors and the Senior Lienholders unambiguously requires, among other things, that each of the Senior Lienholders must provide "written consent" before the Collateral can be released.

72. Section 9.1(a) of the Senior Credit Agreement expressly identifies certain instances where the Administrative Agent may **not** act on behalf of the Indiana Pensioners. In pertinent part, section 9.1 provides:

> (a) Neither this Agreement, any other Loan Document, nor any terms hereof or thereof may be amended, supplemented or modified except in accordance with the provisions of this Section 9.1 or as otherwise expressly provided herein. The Required Lenders and the Company (on its own behalf and as agent on behalf of any other Loan Party party to the relevant Loan Document) may, or, with the written consent of the Required Lenders, the Administrative Agent and the Company (on its own behalf and as agent on behalf of any Loan Party party to the relevant Loan Document) may, from time to time, (i) enter into written amendments, supplements or modifications hereto and to the other Loan Documents for the purpose of adding any provisions to this Agreement or the other Loan Documents or changing in any manner the rights or obligations of the Lenders or of the Loan Parties hereunder or thereunder or (ii) waive, on such terms and conditions as the Required Lenders or the Administrative Agent, as the case may be, may specify in such instrument, any of the requirements in this

> Agreement or other Loan Documents or any Default or Event of Default and its consequences; **<u>provided</u>, <u>however</u>, that no waiver and no such amendment, supplement or modification shall**:
>
> . . .
>
> (iii) reduce any percentage specified in the definition of Required Lenders, consent to the assignment or transfer by or release of the Company of any of its rights and obligations under this Agreement and the other Loan Documents, **release all or substantially all of the Collateral** or release all or substantially all of the Subsidiary Guarantors or Holdings from their obligations under the Guarantee or the Security Agreement (except as otherwise provided in the Loan Documents), in each case **without the written consent of all Lenders**.

Senior Credit Agreement, § 9.1(a)(iii) (emphasis added). The plain language of section 9.1(a)(iii) unequivocally provides that the Administrative Agent does not have the authority to release all or substantially all of the Collateral on behalf of any other lender party to the Senior Credit Agreement without the written consent of **all** the Senior Secured Lenders. Without that consent, section 9.1(a)(iii) expressly prohibits the Administrative Agent from engaging in any acts that would release all or substantially all of the Collateral.

73. Moreover, the Administrative Agent may not consent on behalf of the Indiana Pensioners to satisfy section 9.1(a)(iii) because such consent is outside the scope of its delegated powers under the Senior Credit Agreement. Under New York law,[10] an agent's authority to bind a principal is limited by what powers the principal grants to the agent. In re Parmalat Securities Litig., 594 F. Supp. 2d 444, 451-52 (S.D.N.Y. 2009) (quoting Merrill Lynch Interfunding, Inc. v. Argentis, 155 F.3d 113, 122 (2d Cir. 1998) (applying New York law)).

74. No provision in the Senior Credit Agreement or the accompanying loan documents expressly delegates to the Administrative Agent the power to release all or substantially all of the Collateral on behalf of Senior Secured Lenders without each such lender's written consent. In fact, as discussed above, section 9(a)(iii) expressly prohibits the

[10] New York law applies pursuant to section 9.11 of the First Lien Credit Agreement.

Administrative Agent from taking such action. Based on the clear and unambiguous language of section 9(a)(iii), the Indiana Pensioners never granted to the Administrative Agent the authority to release all or substantially all of the Collateral on behalf the Senior Secured Lenders without all of their written consent. Accordingly, the Administrative Agent cannot consent to the proposed sale on behalf of the Indiana Pensioners.

75. Indeed, according to the Debtor and the Treasury Department, and reflecting their knowledge that the credit documents do not permit the Administrative Agent to approve the proposed sale on behalf of the Indiana Pensioners, the bankruptcy was filed because they did not get 100% consent from the secured lenders.

B. The Debtors Have Failed To Satisfy 11 U.S.C. § 363(f)(3)

76. Section 363(f)(3) authorizes a sale free and clear of the Indiana Pensioners' liens only if "the price at which such property is to be sold is greater than the aggregate value of all liens on such property." 11 U.S.C. § 363(f)(3). The majority of courts hold that "greater than the aggregate value of all liens" means the sale must be for more than the entire debt asserted against the property. See Clear Channel Outdoor, Inc. v. Nancy Knupfer, Chapter 11 Trustee, et al. (In re PW, LLC), 391 B.R. 25, 40-1 (9th Cir. B.A.P. 2008) (holding that section 363(f)(3) of the Bankruptcy Code does not authorize the sale free and clear of a lienholder's interest if the price of the estate property is equal to or less than the aggregate amount of all claims held by creditors who hold a lien or security interest in the property being sold); see also Matter of Riverside Investment P'ship, 674 F.2d 634, 640-1 (7th Cir. 1982); Richardson v. Pitt County (In re Stroud Wholesale, Inc.), 47 B.R. 999, 1002 (E.D. N.C. 1985), aff'd mem., 983 F.2d 1057 (4th Cir. 1986) (free and clear sale not allowed unless the sale proceeds will fully compensate all secured lienholders); Scherer v. Fed. Nat'l Mortgage Ass'n (In re Terrace Chalet Apartments, Ltd.), 159 B.R. 821, 828 (N.D. Ill. 1993) (same); In re Perroncello, 170 B.R. 189, 190-2 (Bankr.

D. Mass. 1994) (same); <u>In re Feinstein Family P'ship</u>, 247 B.R. 502, 508 (Bankr. M.D. Fla. 2000) (same); <u>In re Canonigo</u>, 276 B.R. 257, 262-3 (Bankr. N.D. Cal. 2002) (same); <u>Criimi Mae Servs. Ltd. P'ship</u> v. <u>WDH Howell, LLC</u> (<u>In re WDH Howell, LLC</u>), 298 B.R. 527, 531 (D. N.J. 2003) (same); <u>see also</u> <u>In re Healthco Int'l, Inc.</u>, 174 B.R. 174, 176 (Bankr. D. Mass. 1994) (same). Although a minority of courts have held that the aggregate value of all liens refers only to the economic value of such liens, <u>see e.g.,</u>. <u>In re Terrace Gardens Park P'ship</u>, 96 B.R. 707(Bankr. W.D. Tex. 1989), the majority decisions are well reasoned, consistent with the plain meaning and structure of the Bankruptcy Code. This Court should follow the majority rule.

77. As explained by the court in <u>Clear Channel</u>, "[t]he [Bankruptcy] Code. . . tends to refer not to the economic value of the property secured by liens but to the value of claims secured by those liens." 391 B.R. at 38. Moreover, the logic of the minority decisions does not justify the sale of collateral over the objection of an undersecured creditor because the statute expressly requires that the sale price be <u>greater</u> than, not just equal to, the value of the liens upon the property. Such condition cannot be met unless the price is greater than the nominal amount of a secured creditor's claim because, if a creditor is undersecured, the price can only equal a secured creditor's claim. <u>Clear Channel</u>, 391 B.R. at 40-41. Finally, the reasoning asserted by the court in <u>Terrace Gardens</u> to justify invocation of the lesser standard assumed that a creditor who disagreed with the proposed sale had the right to credit bid through section 363(k), which permits the creditor to bid its lien to head off the sale. 96 B.R. at 713. Should that recourse be disallowed, the conclusion in Terrace Gardens is even more unjustifiable. Finally, Congress specifically recognized that a sale under 363(f)(3) must exceed the aggregate amount of the liens by creating an explicit exception to the rule for chapter 12 debtors. 11 U.S.C. § 1206.

78. Here, the Debtors' proposed sale, free and clear of liens, plainly does not exceed the $6.9 billion of Senior Secured Debt, let alone the aggregate value of all liens on such property. Thus, the Debtors fail to satisfy the standard required by section 363(f)(3).

79. As set forth above, under the transaction proposed by the Debtors, the Debtors would sell substantially all of their assets—including the Collateral—to New Chrysler. New Chrysler would then provide the Senior Secured Lenders with $2 billion. (See Sale Motion, at 41 & 58) However, according to the Debtors' own liquidation analysis, the liquidation value of their assets could exceed $3.2 billion. (See Viability Report, at 167) The Indiana Pensioners could be better off in a straight liquidation of the Debtors' assets.

V. The Proposed Sale Eliminates The Chrysler Non-TARP Lenders' Right To Credit Bid Granted By Section 363(k)

80. Under a sale pursuant to section 363 of the Bankruptcy Code, a holder of a secured claim, such as the Senior Secured Lenders, has the right to credit bid for the purchase of the asset that is the subject of the sale. The secured party's right to credit bid is expressly granted by statute:

> At a sale under subsection (b) of this section of property that is subject to a lien that secured an allowed claim, unless the court for cause orders otherwise the holder of such claim may bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property.

11 U.S.C. § 363(k). Credit bidding permits a secured creditor to bid its debt and take title to the property in order to, among other things, protect against a debtor's sale of its collateral for less than its debt. The Debtors here propose to abrogate the Indiana Pensioners' right to credit bid granted by section 363(k), without compensation or cause.

81. Courts have consistently held that if the creditor has a valid lien on the property, the secured creditor can credit bid the face amount of its claim, even if the claim is potentially

undersecured. See In re SubMicron Sys. Corp., 432 F.3d 448, 459 (3d Cir. 2006) ("It is well settled among district and bankruptcy courts that creditors can bid the full face value of their secured claims under § 363(k)."); In re SunCruz Casinos, LLC, 298 B.R. 833, 839 (Bankr. S.D. Fla. 2003) ("[A] secured creditor may credit bid the entire amount of its claim, including the unsecured portion thereof."); In re Realty Inv., Ltd. V, 72 B.R. 143, 146 (Bankr. C.D. Cal. 1987) (finding that the "allowed claim" for purposes of credit bidding is the creditor's total claim without reference to the "value" of the property); 3 COLLIER ON BANKRUPTCY ¶ 363.09 (15th ed. rev. 2008). A secured creditor's claims are treated as equal to cash for the purposes of credit bidding. See In re HNRC Dissolution Co., 340 B.R. 818 (E.D. Ky. 2006) ("Clearly 11 U.S.C. § 363(k) treats credit bids as a method of payment – the same as if the secured creditor has paid cash and then immediately reclaimed the cash in payment of the secured debt.").[11]

82. The Indiana Pensioners' right to credit bid cannot be abrogated without same compensation or adequate protection, yet that is just what the Debtors seek to do through the proposed sale.

VI. Any Finding Of "Good Faith" Under Section 363(m) Is Inappropriate

83. The facts stated in the Sale Motion (and the supporting declarations) do not support any finding that (i) the New Chrysler is a purchaser in "good faith" under section 363(m) of the Bankruptcy Code, or (ii) would vitiate the relief provided by section 363(n) of the Bankruptcy Code. The Debtors have the burden to establish the "good faith" of New Chrysler. Indeed, the court is "required to make a finding with respect to the 'good faith' of the purchaser."

[11] The court has discretion to deny the right to credit bid for "cause," but no cause exists here. 11 U.S.C. § 363(k). Courts have found that cause may exist when: (1) the secured creditor's liens are in dispute, and in such circumstances, a court may place conditions on the creditor's ability to credit bid; (2) the credit bid prejudices other secured parties with equal priority to the credit bidder; or (3) the creditor has failed to comply with court-approved bidding procedures. See In re Diebart Bancroft, 1993 WL 21423, *4-5 (E.D. La. Jan. 26, 1993); In re Taxi Takeout Holdings, 307 B.R. 525, 536 (Bankr. E.D. Va. 2004); Antaues Tech. Servs., 345 B.R. 556 (Bankr. W.D. Va. 2005); Greenblatt v. Steinberg, 339 B.R. 458 (N.D. Ill. 2006).

Ginther v. Ginther Trusts (In re Ginther Trusts), 238 F.3d 686, 689 (5th Cir.), cert. denied, 534 U.S. 814 (2001). Based on the facts adduced, the burden on the Debtors is unsustainable and no finding of good faith is appropriate.

84. To facilitate bankruptcy sales, Congress provided that the validity of a sale to a good faith purchaser will not be affected by a reversal or modification of the order approving the sale unless the order is stayed pending appeal. 11 U.S.C. § 363(m). Collusion, coercion, and any other attempt to take unfair advantage destroys good faith. Here, there is no good faith purchaser. The Treasury Department is on both sides of the transaction, controlling both the Debtors and New Chrysler, and is forcing the sale to promulgate the Executive Branch's political agenda to the detriment of the Indiana Pensioners.

VII. Even The Executive Branch Must Comply With The Bankruptcy Code

85. In this case, the Court is being asked to determine whether the proposed sale is appropriate. The fate of the U.S. automotive industry is high on the national agenda and is being closely monitored by the public. In recent months, high ranking members of the Executive Branch have dedicated substantial time and resources in an effort to rescue this troubled industry. Although the level of public interest and the federal government's involvement make this case unusual, these circumstances do not change the absolute rights of the Senior Secured Lenders to the protections provided by the Bankruptcy Code.

86. Nevertheless, apparently ignoring the plain letter of the law, the Debtors and the Government have asked the Court to approve the Sale Motion, which seeks to alter the very priority established by the Bankruptcy Code. The transaction that the Debtors and the Government seek to implement is designed primarily to benefit junior creditors whose claims the Executive Branch seeks to elevate in contradiction of the law. The system of checks and

balances put in place by the United States Constitution should not be influenced or disturbed by the Executive Branch's priorities.

87. Given the current political environment, the significance of an independent judiciary cannot be overstated. "The Federal Judiciary was [] designed by the Framers to stand independent of the Executive and Legislature – to maintain the checks and balances of the constitutional structure, and also to guarantee that the process of adjudication itself remained impartial." N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 58 (1982). Indeed, the Supreme Court has warned that permitting "the political branches [] the power to switch the Constitution on or off at will . . . would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not [the judiciary], say 'what the law is.'" Boumediene v. Bush, 128 S. Ct. 2229, 2259 (2008) (citing Marbury v. Madison, 1 Cranch 137, 177 (1803)). Here, the Executive Branch has effectively "turned off" the constitutional property rights of the Indiana Pensioners. This "denial of constitutionally protected rights demands judicial protection," notwithstanding the fact such protection necessitates this Court "entering into [a] political thicket[]." Reynolds v. Sims, 377 U.S. 533, 566 (1964).

88. Despite the pressures of other government and societal forces, the creditor protections inherent in the chapter 11 process must be upheld.

CONCLUSION

89. The Sale Motion asks this Court to approve an illegal redistribution of the Debtors' value that flatly ignores the most basic creditor protections established by the Bankruptcy Code and bypasses the priority scheme established by the Bankruptcy Code. It should be denied.

WHEREFORE, the Indiana Pensioners respectfully request entry of an order denying the Debtors' Sale Motion and granting such other and further relief as the Bankruptcy Court deems just and proper.

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